Coming now to the real questions in this matter, what are the actual proceedings still open to the Respondents and have the Respondents authority to undertake them.

Counsel submitted that as regards the Rent Assessment Board the Board can still give its consent to the prosecution of the other Applicant Balwant Singh under Section 5 of the Rent Assessment Board (Additional Powers) Ordinance 1946 and the fact that it is the President and not the Board which may give this consent was met by the suggestion that Prohibition should be addressed to the Board and its officers and servants and would be binding on the President.

Secondly, as regards the Bank of China it was submitted that it was open to the Bank to continue its prosecution of Hardial Singh and institute similar criminal proceedings against the other applicant Balwant Singh. And thirdly that as regards the District Criminal Court it was open to the Judge thereof to hear and determine the proceedings instituted against Hardial Singh and also any other similar proceedings which may be instituted against Balwant Singh.

The applicants claim that all these proceedings would be without jurisdiction for the same reason namely that they would be founded on the Board's order of 26th July 1946 which it is alleged was itself made without authority.

This implies that the Board's order, if made with proper authority, would confer jurisdiction on the Respondents to do the acts referred to. But is this so? It is not necessary to consider this question as regards the Bank of China Ltd. as the authorities are quite clear that prohibition is for the purpose of safeguarding the prerogative and the administration of justice and is therefore only directed to persons and tribunals exercising judicial functions. In any case the Bank's right to institute a private prosecution does not depend on the Board's order but on the Criminal Procedure Code where it is expressly saved by Section 402 (8) and that right is in no way affected by the validity or otherwise of the order.

As regards the Rent Assessment Board even assuming that prohibition could be directed to its President it is apparent that authority to consent to a prosecution is a purely discretionary power conferred by Section 5 of the Rent Assessment Board (Additional Powers) Ordinance 1946. The fact that the President in considering whether or not to give his consent would be influenced by the validity or otherwise of the Board's order does not affect his jurisdiction to exercise this discretionary power.

As regards the District Criminal Court, this is a tribunal exercising judicial functions and may properly be prohibited from acting in excess of its jurisdiction. But by section 9 (1) (b) of the Criminal Procedure Code the District Court has power to "hear, try, determine and dispose of" prosecutions for offences cognizable by it which are committed within the limits of its jurisdiction and under this section the Court undoubtedly has authority to hear and determine the subject-matter of the Bank of China's complaint. This authority is quite independent of the Board's order and the fact that the Board's order will necessarily be produced in evidence at the inquiry has no bearing on the Court's power to undertake and determine the proceedings.

The Respondents' several jurisdictions to do the acts which it is sought to prohibit are therefore not dependent on the Board's order and it is unnecessary to consider whether that order was made with proper authority or not.

The applicants' real object appears to be to have the Board's order set aside in order to avoid its otherwise proper consequences. There are proceedings appropriate to this purpose but clearly it cannot be achieved by this application.

The application fails because the applicants have not shown that any person or tribunal exercising judicial functions is in a position to act without or in excess of jurisdiction and it is therefore dismissed.

Application Dismissed.

BOON HOE CHIA v. S. QURESHI.

[App. Civ. Juris. (Pretheroe, Ag. C.J. M.U., Brown, J. and Thorogood, Ag. J.) March 1, 1948]
[Singapore Civ. App. No. 17 of 1947]

Malicious prosecution — Reasonable and probable cause — Burden of proof — Malice.

On the night of the 9th March 1945, 2 persons entered the Defendant's house and assaulted him. Ikbal, a neighbour, said that he saw a man and a woman in a car outside the Defendant's house at the time of the incident.

Defendant laid an information before the Police Magistrate in whose presence Ikbal identified the Plaintiff as the man he saw in the car. The Magistrate refused process. A second information was filed and process was directed to issue against one of the 2 persons. Then followed an intervention by the Japanese Military Police and the matter appeared to be closed.

On the re-occupation the Defendant laid another information in substantially similar terms to the previous two informations and asked for a warrant of arrest against the Plaintiff for abetment of the offences alleged to be committed by the 2 persons aforesaid.

The charge against the Plaintiff was subsequently withdrawn because Ikbal went back on his original

statement and said that he was unable to identify the man he saw in the car.

Held, (1) That the burden is on the Plaintiff to prove both want of reasonable and probable cause and malice. Malice alone is not sufficient as the most express malice cannot imply want of probable cause, and in the face of facts showing reasonable and probable cause for instituting proceedings the question of dishonest motive need not be considered. (2) That the Plaintiff (Appellant) had failed to discharge the onus which was on him of showing that the Defendant (Respondent) had acted without reasonable and probable cause.

The action was dismissed with costs.

Claude H. da Silva for the Plaintiff (Appellant).

K. A. Seth for the Defendant (Respondent).

Jobling, J. : — This is an action for damages for malicious prosecution and at the hearing the following facts have been disclosed.

Some trouble occurred between the Defendant and the Plaintiff and a woman named Mrs. Rozario on the afternoon of the 9th of March 1945 and at 3 a.m. the following morning two persons named Hock Tye and Rogers entered the Defendant's house and assaulted him. They then left and Defendant saw a car outside the gate and heard a voice which he recognised as Mrs. Rozario's coming from it. Later Defendant was informed by a neighbour named Ikbal that he had seen one woman and two men in the car and one of these men was the Plaintiff. The Defendant thereupon laid an information before the Police Magistrate on the 15th of March detailing the events of the entry of his house and assault and asking for process to issue against Hock Tye, Rogers and Mrs. Rozario. The Magistrate examined persons concerned in the events and during the examination, Ikbal identified the Plaintiff as the man he had seen in the car at the time of the assault. At the end of his examination the Magistrate decided to file the complaint and refused process.

On the 19th of March, 4 days later, the complainant again made a similar complaint asking for a warrant to be issued against the same three persons. After considering this complaint, the Magistrate ordered a warrant of arrest to issue for Hock Tye. Shortly after this Mrs. Rozario, Hock Tye and Rogers were called before the Japanese Military Police and told they ought to settle the matter. All three then signed an undertaking that they would not again insult Defendant. The Defendant himself signed an undertaking two days later that he would have nothing to do with Mrs. Rozario in the future, and the matter appear to have been considered as closed.

However, on the reoccupation of Malaya by the British the Defendant laid another information on the 6th of October 1945 in the same terms as the two previous ones except that in this case he asked also for a warrant of arrest against the Plaintiff for abetment of the offences committed by the other parties to the assault. Process was issued and Police investigation of the complaint ensued. During the investigation, Ikbal went back on his original statement and said that he was quite unable to identify the man he saw in the car that night. But the papers were sent to the Public Prosecutor and his authority was obtained for proceeding with the charge. The charge against the plaintiff Chia was eventually withdrawn by the Public Prosecutor and the Plaintiff acquitted.

On these facts the Plaintiff alleges that the prosecution was instituted by the Defendant without reasonable and probable cause. It is clear on the authority of *Willans v. Taylor*[1] that the onus is on the Plaintiff to prove the negative, namely, that Defendant had no reasonable and probable cause, and also to prove malice and he seeks to do this, first of all, by showing that the Defendant was actuated by malice towards him arising out of jealousy in connection with Mrs. Rozario, secondly, by the fact that in neither the first nor second informations did the Defendant allege that the Plaintiff was concerned in the assault (which he suggests shows that the Plaintiff did not believe in his subsequent allegation) and thirdly, by the fact that he told the Magistrate on the latter's enquiring into the first information that he had nothing against the Plaintiff and fourthly, by the argument that once Ikbal had gone back on his original statement, Defendant could not honestly believe that Plaintiff was implicated.

Against these allegations there is the fact that Defendant referred to the Plaintiff's presence in the car at the time of the assault in both his first and second informations although he did not then ask for process to issue against him. There is also the fact that he was strongly advised by Mr. Goho not to bring proceedings against the Plaintiff during the Japanese occupation. Further it appears that Ikbal did not withdraw his statements implicating the plaintiff until the 23rd of October 1945 some 17 days after the Defendant had laid his third information.

The burden is on the Plaintiff to prove both want of reasonable and probable cause and malice. Malice alone is not sufficient as the most express malice cannot imply want of probable cause, *Johnstone v. Sutton*[2], and in the face of facts showing reasonable and probable cause for instituting proceedings the question of dishonest motive need not be considered.

The facts within the Defendant's knowledge at the time he made his third complaint (the first time he

implicated the Plaintiff) were that he had been assaulted by two known persons, at 3 o'clock in the morning that he had seen a car outside his gate at the time and that Ikbal had identified the Plaintiff as one of persons in that car. The only question is whether these facts are sufficient to establish a reasonable and honest belief in the Defendant's mind that the Plaintiff was a party to this assault. In my opinion these facts are sufficient to establish such a belief.

I find therefore that the Defendant had reasonable and probable cause for instituting the proceedings and that the Plaintiff has not discharged the burden which is upon him of proving want of probable cause. The claim is dismissed with costs.

The Plaintiff appealed against the decision of Jobling, J.

The main question in this appeal was whether or not the learned trial Judge was wrong on the evidence before him in holding that the appellant had not discharged the onus which was upon him.

It was not disputed that in actions for malicious prosecution the onus is always upon the plaintiff to establish by some evidence that the defendant acted without reasonable and probable cause. But it was contended by the appellant on the authority of **Willans** v. **Taylor**(1) that slight evidence is sufficient to discharge that onus, which then shifts to the defendant who will have to show that he acted with reasonable and probable cause.

Held, that on the facts before him the learned trial Judge was right in holding that the Appellant had not discharged the onus which was on him and the appeal was accordingly dismissed.

per Brown, J.—"The essential difference between **Willans** v. **Taylor**(1) and the present case is that in the former the reasons which the defendant had for prosecuting and which the defendant alone knew were not in evidence before the Court, while the reasons which Qureshi had for instituting proceedings against Chia were before the Court".

Cases referred to :—

(1) *Willans v. Taylor,* (distinguished) 130 E.R. 1250.
(2) *Johnstone v. Sutton,* 99 E.R. 1243.
(3) *Abrath v. North Eastern Railway Co.,* 11 A.C.
(4) *Hicks v. Faulkner,* 8 Q.B.D. 167.
(5) *Broad v. Ham,* 132 E.R. 1278.
(6) *Bradshaw v. Waterlow,* (1915) 3 K.B. 527.
(7) *Abrath v. North Eastern Railway Co.,* 11 Q.B.D. 451.
(8) *Incledon v. Berry & Ors.,* 170 E.R. 930.
(9) *Purcell, spinster v. M'Namara,* 170 E.R. 928.

COURT OF APPEAL.

E. D. Shearn (*Claude da Silva* with him) for the Appellant.

K. A. Seth for the Respondent.

Cur.. Adv. Vult.

Pretheroe, Ag. C. J. : —I have had an opportunity to read the judgment of Brown J. in this appeal, and I am in agreement with the conclusions he has reached. I desire only to add a few comments on the first submission made by Mr. Shearn for the appellant viz: that though the onus is on the plaintiff in an action of this nature to prove that defendant had no reasonable and possible cause for prosecuting, yet slight proof by the plaintiff throws the onus over to the defendant. If I were satisfied that this correctly expresses the law on the subject, my decision in this case would have been different. The authority quoted by Mr. Shearn in support of his proposition was *Willans v. Taylor*(1), but as there are previous cases on this subject I will consider them in chronological order.

In *Incledon v. Berry & others*(8) heard in 1805, the same course was adopted as in the present case. After producing certain evidence Sergeant Lens submitted that it now lay with the defendants to show probable cause. Le Blanc J. over-ruled this submission, but said :—

> Some evidence (though, under the circumstances, slight evidence would be sufficient) must be given on the part of the plaintiff of want of probable cause before the defendants could be called upon for their defence.

Then in *Purcell, Spinster v. M'Namara*(9), which was heard in 1808, plaintiff's counsel finished his case when he considered that "there was sufficient *prima facie* case to throw upon the other side the burden of proving that there was probable cause" for the prosecution. On this submission Lord Ellenborough ruled :—

> I feel great reluctance to stop the trial, but you must give evidence of some circumstance from which the jury may infer the want of probable cause.

Pausing here for a moment, it will be seen that in *Incledon v. Berry*(8) the Judge considered that in the circumstances of that particular case slight evidence would be sufficient and, in *Purcell v. M'Namara*(9) what counsel considered a *prima facie* case was held to be insufficient. Next follows, in 1829, *Willans v. Taylor*(1) the case on which Mr. Shearn relied. In that case the particular point under consideration does not appear to have been raised by counsel. In fact both sides appear to have agreed that "it lies on plaintiff to show that the defendant proceeded without probable cause and not for the defendant to show that he had probable cause".

In fact counsel's submission was that there was abundant evidence of want of probable cause. Although the point under consideration was not mentioned by counsel, the cases, to which I have already

referred, were cited. In their judgments the learned Judges decided as follows :—

> **Tindal, C.J.:** The plaintiff must take the first step ..... There must therefore be some evidence of want of probable cause before the defendant can be called on to justify his conduct.
>
> **Park, J.:** But slight evidence is sufficient to throw on the other side the onus of showing that there was probable cause.

Considered alone these remarks appear to lend support to Mr. Shearn's submission, but in 1886 the House of Lords heard *Abrath v. The North Eastern Railway Co.*,[3]. One submission in that appeal was that "very slight evidence on the part of the plaintiff was enough to throw the onus of proof upon the defendants". Thus the point under consideration was placed squarely before the Court. The first judgment was delivered by Lord Watson as follows :—

> The authorities cited by Mr. MacClymont in the course of his able argument do not form, in my opinion, any exception to the ordinary rule that the burden of proof lies upon the plaintiff. Some of them established that a slight amount of evidence may be sufficient to launch the plaintiff's case when the whole circumstances of the case are in themselves sufficient to raise a presumption of want of reasonable care on the part of the prosecutor, but that is not the case here.

The other Law Lords voiced no disagreement with this expression of opinion. As far as I can trace, that decision has never been varied.

Applying that judgment to the facts of the present case, I do not consider that the whole circumstances of this case are sufficient to raise a presumption of want of reasonable care on the part of the prosecution. That being the case, slight evidence of want of probable cause is not sufficient to shift the onus of proof to the defendant; the usual rules apply.

For these reasons I would dismiss this appeal with costs to the respondent.

Brown, J. : — The short point in this appeal is whether the learned trial Judge was right in holding that the plaintiff had failed to make out a case that the defendant had instituted criminal proceedings without reasonable and probable cause. It is not disputed that in actions for malicious prosecution the onus is upon the plaintiff to establish by some evidence that the defendant acted without reasonable and probable cause. But it was contended, on behalf of the appellant, that slight evidence is sufficient to discharge this onus, which then shifts to the defendant, who then assumes the onus of proving affirmatively that he acted with reasonable and probable cause. That was the first ground of appeal argued by Mr. Shearn: that the learned Judge had misdirected himself in failing to appreciate that the evidence which was required in order to shift the onus from the plaintiff to the defendant was no more than slight. Support for this contention is said to be found in the case of *Willans v. Taylor*[1]. In order to understand the decision in that case it is important that the facts should be made clear. The defendant had presented two bills before the grand jury alleging perjury against the plaintiff. He failed to appear before the grand jury on either bill, and both bills had therefore been ignored. He then presented a third bill, and on this occasion gave evidence before the grand jury, who upon hearing his evidence considered that he had made out what we should call a sufficient *prima facie* case and, as they termed it in those days, 'found' the bill. The defendant for three years took no step to bring the case on for trial, until the plaintiff (then the accused) himself took the initiative and the case came on for hearing. But when the defendant, upon whose evidence the case for the prosecution depended, was due to be called into the witness-box he absented himself; and the plaintiff was of course discharged. The plaintiff then commenced an action for malicious prosecution, and the trial Judge held that the plaintiff had failed to adduce sufficient evidence to establish that the defendant had acted without reasonable and probable cause and directed a non-suit. On an application for a new trial it was held that the evidence adduced by the plaintiff was, in the circumstances, sufficient and a new trial was ordered; and Park J. said that "slight evidence is sufficient to throw on the other side the onus of showing that there was probable cause. And where, as in the present case, the facts lie in the knowledge of the defendant himself, he must shew a probable cause". But Park J. was speaking of the facts in that particular case. The plaintiff had proved, firstly, that the defendant had presented two bills and had not appeared to give evidence on either of them; secondly, that having obtained the third bill he had kept the prosecution suspended for 3 years; and thirdly, that at the trial he had absented himself. This evidence was held to be sufficient. The plaintiff could prove no more, because only the defendant knew the facts upon which he had instituted criminal proceedings and only he could give evidence of those facts so as to enable the Court to determine whether he had reasonable and probable cause or not.

That case is the only case among the authorities which have been cited to us which affords any ground for the suggestion that in actions for malicious prosecution a lower standard of proof is required of

the plaintiff than in other civil actions. On the contrary, the authorities shew that there is no such exception in the case of actions for malicious prosecution and that the standard of proof required of the plaintiff is as a general rule the same as in other actions, although it may sometimes happen in a particular case, where the circumstances themselves are sufficient to raise a presumption that the defendant acted without reasonable cause or where the facts are peculiarly within the defendant's knowledge, that slight evidence is sufficient to cast upon the defendant the onus of proving facts which he alone can prove. Nevertheless the general rule remains. In this connexion I would refer to the judgments of Lord Watson in *Abrath v. North Eastern Railway Co.*,[3] and of Hawkins J. in *Hicks v. Faulkner*[4]. Lord Watson (at page 250) said :—

> The authorities cited.....do not form, in my opinion, any exception to the ordinary rule that the burden of proof lies upon the plaintiff. Some of them establish that a slight amount of evidence may be sufficient to launch the plaintiff's case when the whole circumstances are in themselves sufficient to raise a presumption of want of reasonable care on the part of the prosecutor, but that is not the case here.

And Hawkins J. (at page 170) said :—

> To succeed in an action for malicious prosecution, the plaintiff must allege and establish two things — absence of reasonable and probable cause and malice. The affirmative of these allegations is upon him. Failing to establish both of them, he fails altogether. In this respect the action for malicious prosecution does not differ from any other action in which the plaintiff is called upon to prove his case.

But Mr. Shearn says that here there is a piece of evidence which must throw doubt upon the defendant's belief in the charge. This, says Mr. Shearn, is sufficient to launch the plaintiff's case and to shift the onus to the defendant to remove that doubt. The piece of evidence relied upon is a passage in Mr. Byrne's note which he made at the conclusion of the defendant's first information on the 15th of March, which appears on page 46 of the Record and reads as follows :—

> "Complainant stated finally he is not interested to proceed, and that he has nothing against Mr. Chia".

In order that the passage may be properly understood it is necessary to set out the nine lines of the note which precede it. They are as follows :—

> Ikbal stated that the man he saw in the car that night at complainant's house was the same Chinese he saw with Blanche Rozario in the trishaw. He learnt later from complainant that this man was a lawyer. Asked if this man was anyhere in Chambers, he says he is quite definite that Mr. Chia was the man (he pointed to Mr. Chia). Mr. Chia stated that he was never in the car that early morning. Mr. Chia stated that Hock Tye was a detective working under one Kanemura M. P. *Complainant stated finally he is not interested to proceed, that he has nothing against Mr. Chia.*

It was strongly argued that the only possible construction of those words, coming after the statement of Ikbal and the denial by Mr. Chia, is that the defendant accepted Mr. Chia's denial, and that, disbelieving Ikbal's statement or believing Ikbal to be mistaken, he had no ground for supposing that Mr. Chia had abetted the offence of house trespass in respect of which he was then asking for a warrant against Hock Tye and for warrants against Blanche Rozario and Rogers for abetting Hock Tye. If the construction contended for is correct there is an end of the matter, because the case then falls under the decision in *Broad v. Ham*[5], which decided that, even though there is evidence to show a probable cause for bringing the charge, if the defendant did not in fact believe it he has no reasonable and probable cause for instituting the prosecution. If that were the case here, that would dispose of the matter.

Therefore the question resolves itself into a short one: is the construction contended for by Mr. Shearn correct? If we were to isolate the defendant's statement from the rest of the evidence in this case no one would dispute Mr. Shearn's construction of it. But that is only one piece of the evidence which was before the learned trial Judge, and it had to be considered in conjunction with the rest. The evidence must be taken as a whole. We find that four days after he made this statement the defendant again asserts (in para. 9 of his second information dated the 19th of March) that Ikbal told him that Chia was in the car on that night. He makes this assertion before the same Magistrate to whom he had stated that he had nothing against Mr. Chia. Neither in his first nor in his second information does he ask for process to issue against Chia, but in both of them he says that he was informed by Ikbal that Chia was in the car. If he disbelieved Ikbal on the 15th of March, why should he repeat, on the 19th of March, the information which Ikbal had given him? But upon the question of why, if he believed Ikbal, he did not ask for process to issue against Chia in March instead of waiting till October, it seems to me that a most important piece of evidence is provided by Mr. Goho. Mr. Goho had been advising the defendant, whose mode of life seems to have rendered advice necessary from time to time.

And upon the question of issuing process against Chia, this was the advice given to him as recorded in the evidence of Mr. Goho :—

> "I advised him not to apply for process against Chia. I was very friendly with the plaintiff and I did not want him involved in any criminal proceedings particularly in Jap. occupation. I knew what would happen to him".

All these matters were considered by the learned Judge in his Judgment. It is said that he did not attach sufficient importance to the defendant's statement that he had nothing against Mr. Chia. But the learned Judge had to consider that in the light of, and in conjunction with, the rest of the evidence, bearing in mind the general rule that the onus was upon the plaintiff. And in his Judgment (at page 28 of the Record) he first sets out the points which tend to establish the plaintiff's case (including the defendant's statement that he had nothing against Chia), and then he proceeds to consider the points which detract from the plaintiff's case; and on striking a balance he comes to the conclusion that upon the whole of the facts before him the plaintiff has failed to discharge the onus. Faced with the fact, as recorded in Mr. Byrne's evidence (taken *de bene esse*), that Ikbal, in the presence of the defendant, "did not hesitate in identifying Mr. Chia," I find it impossible to say that the learned Judge was wrong in coming to the conclusion that the plaintiff had failed to establish as a fact that the defendant had no reasonable and probable cause for believing that Chia was in the car upon the night in question.

But then it is said that even if the defendant believed that Chia was in the car that affords no ground for believing that he was abetting the offence of house-trespass. The plaintiff's evidence is that seven hours earlier he was in a trishaw with Blanche Rozario when the defendant jumped out of a taxi, which drew across the trishaw thus compelling it to stop. The defendant appeared "very angry" and asked what the plaintiff was doing. The defendant then lifted the woman out of the trishaw and there was a scene. We are asked to say that no inference can be drawn from that evidence that there was any connexion between the incident of the trishaw and the presence of the plaintiff in the car at 1.30 a.m. on that night, when according to the evidence of Hock Tye he took Blanche Rozario and Rogers to the defendant's house. Again I find it impossible to say that the learned Judge was wrong in drawing such an inference, or that the defendant, if he believed that Chia was in the car, bearing in mind what had occurred the previous evening, was unreasonable in inferring that he was there for the purpose of abetting the offence of house-trespass. For this reason it seems to me that if the plaintiff, upon the whole of the evidence, has failed to establish that the defendant had no reasonable cause for believing that the plaintiff was in the car, it follows that he must also have failed to establish that the defendant had no reasonable cause for believing that the plaintiff was there for the purpose of abetting, in conjunction with Blanche Rozario and Rogers, the commission of house-trespass by Hock Tye.

Mr. Shearn has argued that the effect of the defendant's statement before Mr. Byrne on the 15th of March is to cast doubts upon his belief in October when he issued process, and that those doubts must remain until the defendant has removed them by giving evidence. The defendant alone can remove those doubts, and for that reason Mr. Shearn contends that this case comes into the class of *Willans v. Taylor*[1] and *Broad v. Ham*[5]. In *Willans v. Taylor*[1], as we have seen, the plaintiff proved all that he could prove, and the reasons (if any) which the defendant had for instituting the criminal proceedings were known only to the defendant. And unless he saw fit to disclose them the Court only had before it the evidence of the plaintiff that the defendant had failed to appear to support the first two bills, had kept the prosecution suspended for three years after the third bill had been found, and had absented himself at the trial. That evidence was in the circumstances held to be sufficient. The essential difference between *Willans v. Taylor* and the present case is that in *Willans v. Taylor* the reasons which the defendant had for prosecution, and which the defendant alone knew, were not before the Court. In the present case the reasons which Qureshi had for instituting proceedings were before the Court. They are to be found in Mr. Byrne's evidence where he says that in the defendant's presence Ikbal pointed out Chia as the man in the car, and in the plaintiff's evidence where he describes the trishaw incident seven hours before the house-trespass. *Broad v. Ham* is very similar to this case, except that in *Broad v. Ham* the jury found for the plaintiff, and in this case the Judge found for the defendant. In *Broad v. Ham* the defendant brought a charge against his apprentice for the theft of a cheque for £10, but there was some evidence from which it might be inferred that his real reason for preferring the charge was in order to recover the sum of £15 which he considered to be due to him as part of the premium upon the plaintiff's articles of apprenticeship. In that case, as in the present case,

there was some evidence from which it might be inferred that the defendant did not believe in the charge. This evidence was left to the jury, who found for the plaintiff. On a motion for a new trial it was argued that if the plaintiff had committed a felony, or stood in such circumstances that a reasonable man would believe that he had committed a felony, the defendant's belief was immaterial upon the question of whether there was reasonable and probable cause for bringing the charge, and that the question of whether the defendant believed in the charge ought not to have been left to the jury. It was held that the question was properly left to the jury, and that the verdict of the jury must stand. Just as in that case the evidence regarding the defendant's disbelief in the charge was rightly put to the jury, so in this case the learned Judge (at page 28 of the Record) rightly addressed his mind to the evidence regarding the defendant's disbelief in the charge which was afforded by the defendant's statement that he had nothing against Chia. The only difference is that whereas in *Broad v. Ham* the jury found that the plaintiff had made out his case, in the present case a consideration of the evidence led the learned Judge to the conclusion that the plaintiff had not made out his case.

Next, it was said that the defendant's belief must have been arrived at after due enquiry, and that there was nothing to shew that the defendant had made any enquiry at all. In support of this argument we were referred to Hailsham Vol. 22 p. 15 para. 19. But *Bradshaw v. Waterlow*[6] is authority for saying that before that question is left to the jury there must be some evidence that the defendant did not make proper enquiries. And Brett M. R. in the hearing of *Abrath v. North Eastern Railway Co.*,[7] before the Court of Appeal said :—

> It follows, therefore, to my mind that if the direction of Cave, J., to the jury was simply that it was a necessary part of the question whether there was a want of reasonable and probable cause for instituting the prosecution against the plaintiff, that it should be decided whether reasonable care had been taken by the defendants to inform themselves of the true state of the case, and that the burden of proving that minor proposition, as well as the whole proposition, lay upon the plaintiff, it is a direction which cannot be impeached.

In the present case the burden of proving that the defendant had failed to make proper enquiries lay upon the plaintiff as part of his main contention that the defendant had instituted these proceedings in October without reasonable and probable cause. He called no evidence of it. He conceivably might have done, because in all three of the defendants' informations reference is made to two neighbours, Ahmad and Jaffar, who upon hearing the noise came into the defendant's house while Hock Tye was there. Whether they would have been of any assistance is a matter for speculation. The fact is that the plaintiff did not call them, and that no evidence was adduced to shew that the defendant failed to make proper enquiries.

Finally, ten type-written questions were handed up by Mr. Shearn for our perusal. Those questions might very properly have been put to the learned Judge at the trial. But our task, in re-hearing this case without the witnesses, is to determine whether or not the learned Judge was wrong, upon all the evidence before him, in coming to the conclusion that the plaintiff had failed to discharge the onus which was upon him of shewing that the defendant had acted without reasonable and probable cause. I am not prepared to say that upon the facts which were before him he was wrong; and I do not agree that he misdirected himself upon the law regarding the quantum of proof.

The appeal must be dismissed with costs here and below.

Thorogood, Ag. J. : —I have had the advantage of reading the judgments of the learned President and of Brown J., and I am in agreement with the conclusions which they have reached.

I have little to add but would refer to what I understood Mr. Shearn to suggest was the real short point in this appeal, namely: what is the construction to be put on the defendant's statement to the Magistrate who inquired into the defendant's first information on the 15th March that he was "not interested to proceed and had nothing against Mr. Chia". I agree with Mr. Shearn that that statement must be taken to mean precisely what it says. I also agree with Mr. Shearn that the statement shows the state of the defendant's mind at the time the statement was made. In any case it is quite clear from the information prepared on behalf of the defendant that when the latter went before the Magistrate in March he had no intention of proceeding against the plaintiff.

I do not agree with Mr. Shearn's submission that, because the defendant subsequently changed his mind and applied in October for process against the plaintiff although he had not done so in March, he necessarily did so without taking reasonable care and without reasonable and probable cause. There is no evidence as to what caused the defendant to change his mind and include the plaintiff among those against whom he sought process in October and no evidence as to

whether he did or did not make further inquiries before taking such action. There is therefore not even the slight evidence regarding defendant's action taken in October which might have shifted the onus of proof on to the defendant.

I am not convinced however that this is a case where slight evidence of want of probable cause would be sufficient to shift the onus of proof to the defendant. There is evidence that in about the middle of June Mrs. Rozario became the mistress of the plaintiff and that on the 3rd of September they set up house together but there is no evidence that these facts were known to defendant before the 6th October. If it is presumed that the defendant knew in October that the plaintiff and Mrs. Rozario were openly living together such knowledge might well have led the defendant on consideration to reject the plaintiff's denial before the Magistrate in March. The defendant would then have been left with the statement of Ikbal that the plaintiff was present in the car with Mrs. Rozario outside defendant's house when the assault took place, which statement might well be regarded as reasonable and probable cause for the action taken by defendant. Mr. Shearn suggested possible reasons for the defendant's change of mind in October. In my opinion the whole circumstances of the case suggest various such possibilities. It is not possible however to presume that the defendant's reason for his action was any of such or any other person. Therefore no presumption can arise that the defendant acted in October without reasonable care. The ordinary rule that the burden of proof lies upon the plaintiff applies.

The learned trial Judge considered the facts within the knowledge of the defendant at the time he made the third complaint (the first time he implicated the plaintiff) and formed the opinion that such facts were sufficient to establish a reasonable and honest belief in the defendant's mind that the plaintiff was a party to the assault. The learned Judge found therefore that the defendant had reasonable and probable cause for instituting proceedings.

I am unable to find anything in the defendant's statement to the Magistrate in March regarding plaintiff which even suggests that the learned trial Judge was wrong in his finding as to the defendant's belief in October. I would therefore dismiss this appeal with costs to the respondent.

Appeal Dismissed.